UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 21 CR 263 (VM)

MANUEL ANTONIO SUQUILANDA,

Defendant. Conference
(via Telephone)
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New York, N.Y.
September 17, 2021
11:10 a.m.

Before:

HON. VICTOR MARRERO,

District Judge

APPEARANCES

AUDREY STRAUSS
United States Attorney for the
Southern District of New York
BY: JANE CHONG
Assistant United States Attorney

FEDERAL DEFENDERS OF NEW YORK, INC.
Attorneys for Defendant
BY: SYLVIE J. LEVINE
S. ISAAC WHEELER

Also Present:
Anna Maria Messina Riso, Interpreter (Spanish)

(Case called)

THE COURT: Do we have Mr. Suquilanda on the line?

THE DEFENDANT: Yes.

THE COURT: I understand that Mr. Suquilanda is following this proceeding with the assistance of interpretation. It is my practice to confirm on the record the identity of the interpreter and that the interpreter is certified or on staff.

THE INTERPRETER: Good morning, your Honor. This is Anna Maria Messina Riso. I'm a certified Spanish interpreter. I'm not on staff, but I'm a certified Spanish interpreter.

THE COURT: Thank you.

I would like, through the interpreter, to confirm that Mr. Suquilanda is following this proceeding and will be able to understand it with this interpretation.

THE DEFENDANT: Yes.

THE COURT: Thank you.

Counsel, please enter your appearances for the record.

MS. CHONG: Your Honor, this is AUSA Jane Chong for the government.

MS. LEVINE: For Mr. Suquilanda, the Federal Defenders of New York, by Sylvie Levine and Isaac Wheeler.

THE COURT: Good morning. Thank you.

As you know, we are in the midst of the COVID-19 pandemic, and I'm conducting this proceeding remotely pursuant

to the authority provided by Section 15002 of the CARES Act and the standing orders issued by the Chief Judge of the Southern District of New York pursuant to that act.

Counsel are appearing telephonically and the defendant is participating by telephone rather than in person. I am conducting this proceeding by teleconference rather than video conference, under the CARES Act, because I find that videoconferencing is not yet reasonably and reliably and practically available at this time in our district, based on my understanding of the district's currently limited technical capabilities and other constraints.

I have not received a written waiver of the defendant's presence before me for this proceeding. I want to confirm on the record that Mr. Suquilanda agrees to proceed by means of teleconference.

Mr. Suquilanda, did you discuss waiving your physical appearance with your attorney?

THE DEFENDANT: Yes, we discussed it.

THE COURT: And do you agree to participate in this proceeding by teleconference?

THE DEFENDANT: Yes.

THE COURT: I thank you.

I find that Mr. Suquilanda has knowingly and voluntarily agreed to participate in this conference by telephone and has waived his right to appear in person.

This is a conference in the underlying case which the Court scheduled to review the status of the matter and also review a contemplated motion for dismissal of the indictment that Mr. Suquilanda, through counsel, have called to the Court's attention. I have reviewed the correspondence related to that and will discuss it more fully in a moment.

Let me first ask the government for the status of any other matters that may be relevant for the Court to know or consider. In particular, questions concerning discovery and review of discovery and opportunities for the government and the defendant to engage in any necessary talks, negotiations relating to the defendant's plea.

Government.

MS. CHONG: Your Honor, the government has produced all discovery in this case. This week we produced what we think is the last of the discovery, which is an audio file of the defendant's removal proceedings.

I don't believe that there is anything to discuss other than the fact that the defense has moved to fully brief this argument challenging jurisdiction of the immigration court and the constitutionality of Section 1326.

Thank you, your Honor.

THE COURT: I thank you.

Let me ask the defense counsel whether there is anything else that we need to go over concerning discovery or

scheduling or other matters before we turn to the question of the motion.

MS. LEVINE: No, your Honor. The only thing I would note is the discovery production that the government made this week may very well bear on the motions, and we would anticipate incorporating that new discovery into our motions practice, in the event that the Court allows us to proceed with that briefing.

If the Court is prepared today to deny an opportunity for us to write the motions we have proposed, I guess what I would say is, after reviewing the newly produced discovery, if we had new information, we would ask for an opportunity to bring that to the Court's attention.

THE COURT: Thank you very much. I have reviewed very closely the submissions that were made by the defendant and by the government on the two issues of the jurisdiction of the immigration court, based on the alleged failure to fill out the necessary information on the form, the notice of appearance. I have also reviewed the dispute concerning the constitutionality of Section 1326 and whether that law, as originally adopted or as subsequently amended in 1952, was a violation of equal protection.

My first impression was, what more is there to be said that has not already been said in your exchange of letters? You have raised the issue. You have pointed to the proper

jurisprudence from the Supreme Court, the Second Circuit, whether or not the Second Circuit's position is consistent with the latest guidance from the Supreme Court. This is on the jurisdictional issue and on the constitutionality of Section 1326. The law of equal protection is what it is. My basic question is, what more briefing is there really a need for at this point?

MS. LEVINEL: Your Honor, I'd like to ask Isaac Wheeler, our immigration specialist, to weigh in here, if that's OK.

MR. WHEELER: Good morning, your Honor. On the jurisdictional question I do think there is more to say. The issues that we are raising have divided district courts. Judge Garaufis in the Eastern District granted a substantially similar motion where the address information was lacking. Two courts in the Southern District have disagreed with that decision.

But germane to that is what's the difference between the requirement that the address be on the notice to appear and the requirement, which they found not mandatory for jurisdiction, that the hearing place be on the notice to appear. The courts that denied the claim found that the hearing -- the filing address of the NTA and the Court where it was to be filed are subsumed under the hearing location, which was incorrect, and I think we need an opportunity to explain

why that's incorrect and why that actually renders an entire section of the regulations saying what must be in an NTA redundant and surplusage. I would ask for an opportunity to sort of explain why we have the better of that argument that has divided district courts, particularly --

THE COURT: Let me interrupt for a moment. What you are saying is that there are different courts that have come out different ways on the question of the legality or nonlegality of filling out those forms. That's a question of having different rulings and for this Court to decide whether it supports interpretation from Judge Garaufis or from the other judges in this district.

What more facts do you really need for this Court to be able to do that? Either Judge Garaufis got it right or he didn't, or the two judges in this district that you are referring to, either they got it right or they didn't.

You tell me what more that I need in order to be able to make that determination as between two applications of the same statute.

MR. WHEELER: We need to be able to explain why the address where the NTA is to be filed is a different thing, the way immigration courts are organized, than a hearing location. And that is not explicitly discussed in Judge Garaufis' opinion. The adverse decisions are later. Just reading those decisions would not illuminate what's wrong with the later two

decisions.

THE COURT: Anything else?

MR. WHEELER: On the jurisdictional question the government is arguing that the Court doesn't need to reach the merits of the issues because Mr. Suquilanda didn't appeal his adverse order. But we need to make a record about what he understood at that time because the Second Circuit case law says that someone who does not knowingly and intelligently waive their agency remedies can still satisfy Sections 1326(d)(1) and (d)(2).

And the government argues that the *Niz-Chavez* decision, which bears on the merits of the issue, is restricted to the stop-time rule. Within the context of a three-page summary I was not able to set forth the reasons why that reading of *Niz-Chavez* is wrong, so I don't feel like we have been able to make our record on that.

THE COURT: Thank you. Anything else?

MR. WHEELER: On the equal protection issue, although I think our argument largely will track the analysis in the District of Nevada, I think Mr. Suquilanda is entitled to a chance to make a factual record, especially because the government's argument will be that the 1952 enactment is the relevant enactment. Mr. Suquilanda is entitled to make his record concerning the *Arlington Heights* analysis of the 1952 amendment.

There is simply nothing before the Court at this point, other than the District of Nevada opinion which it refers to, but does not include all of the expert testimony and legislative history that was submitted to that court. So I think we need and are entitled to an opportunity to make a factual record in support of the equal protection challenge here.

THE COURT: Thank you.

Again, on that issue the Court has read the decision by the Nevada court and the issue really boils down to the same thing that I said before. Either the Judge in Nevada got it right or he got it wrong, and there is a record there. You have made your argument. As I said before, equal protection law is what it is, and I don't see that there should be a need for any vast amount of additional briefing.

Before we resolve that, let me ask the government for any views on what we have been discussing.

MS. CHONG: Your Honor, the government believes that what remains here really are questions of law that could be resolved on the papers that you have before you. But we understand, of course, if the Court would prefer to have more briefing.

THE COURT: Let me suggest that, coming back to what I said earlier, you have made a very extensive case in your correspondence so far. I think it is sufficiently argued.

But I will give the defendant another round of a three-page letter to supplement what you have already submitted and the Court will be in a position at that point to rule on the issues.

Does the government wish to have an additional response briefing?

MS. CHONG: Yes, your Honor.

THE COURT: I will give each side another opportunity to supplement what you have already submitted, to raise any of these -- if you consider these new issues -- I don't consider them new -- or to supplement whatever factual record the defendant may wish to supplement.

How long would the defendant need in order to prepare such a letter, Ms. Levine?

MS. LEVINE: Your Honor, I am going to ask Mr. Wheeler because it's his schedule that's most salient here. So I am going to ask him to answer that.

THE COURT: Mr. Wheeler.

MR. WHEELER: Your Honor, I have two motions due in the next six days. If I could respectfully ask for two weeks, that would be helpful.

THE COURT: Two weeks from today.

MR. WHEELER: Yes.

THE COURT: Let's look at the calendar. What day is two weeks from today?

THE LAW CLERK: That's Friday, October 1.

THE COURT: For the government, how much time would you need in order to submit your response?

MS. CHONG: Your Honor, the government asks for two weeks. We can, of course, submit it earlier if that would be helpful to the Court.

THE COURT: That would be roughly October 15, roughly, if that's not a weekend.

Anything else?

MS. CHONG: Your Honor, the government seeks to exclude time under the Speedy Trial Act from today until the date of the next status conference, whenever the Court chooses to set it.

THE COURT: Thank you.

Ms. Levine.

MS. LEVINE: No objection, your Honor.

THE COURT: On the government's motion to exclude adjourned time from speedy trial calculations from today through October 15, which is the next conference, or the end of the briefing period, no objections recorded by the defendant, the motion is granted. I find that the reasons conveyed to the Court warrant this exclusion of time as it is intended to ensure the effective assistance of counsel and to prevent any miscarriage of justice. The Court is satisfied that the ends of justice served by the granting of this continuance outweigh

the best interests of the public and the defendant in a speedy trial.

This order of exclusion of time is issued pursuant to the provisions of the Speedy Trial Act, Title 18, U.S.C., Section 3161(H)(7)(B), (1), and (4).

Let me come back a moment because I think we are having a little bit of a practical problem. We set October 15 as the date for the government to respond, but the Court may not necessarily be in a position to render a ruling on the 15th, since that's the day that we will have received the government submission. Either the government cuts back on the time it needs in order to respond, or we move the date for the next conference another week out.

MS. CHONG: Your Honor, the government could respond a few days earlier; for example, if, October 12 or 13 would be better for the Court.

THE COURT: Why don't we agree to that instead. The exclusion of time is still on until October 15. If we need a conference on that day, we will let you know.

Why don't we do the following. Let's schedule a conference tentatively for that date. If based on what the Court rules we don't need a conference, we can always reschedule.

On the 15th, Sam, do we have a date -- is that a Friday, by the way? I haven't had a chance to look.

THE LAW CLERK: Hi, Judge. October 15 is a Friday. We have 1 p.m. available.

THE COURT: Let's say 1 p.m. on the 15th of October.

Anything else?

MS. CHONG: Nothing from the government, your Honor. Thank you.

MS. LEVINE: No. Thank you, Judge.

THE COURT: Thank you. Have a good day and a good weekend. Bye.

(Adjourned)